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IN THE

SUPREME COURT OF THE UNITED STATES.

STOVES, INCORPORATED, Petitioner,

vs.

TENNESSEE ENAMEL MANUFACTURING COMPANY, Respondent.

No. 551.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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May it please the Court:

STATEMENT OF THE CASE.

The petition for certiorari state that only one question is presented to this Court—"whether a Court of Appeals should be allowed to reject the findings of a United States District Court in a case tried without a jury, which findings admittedly depended upon conflicting testimony and credibility of witnesses, where the Court of Appeals bases its rejection on the credibility of witnesses."

That this question is not, however, presented by the record in the cause will be seen from the opinions of the district judge (R. 187-193) and of the Court of Appeals

(R. 220-230). The findings depended not on credibility of witnesses, but on an analysis of the evidence and of the permissible inferences to be drawn. The judgment of the district court was reversed not only on a question of fact—that the contract was not made—but also on a question of law—that it was unenforceable for lack of mutuality (R. 228-229).

Respondent does not agree with the statements in the petition (pp. 2-3) as to what was the principal issue tried in the district court or as to what were the principal questions presented to the Court of Appeals. If it should be deemed important to determine what that issue was and what those questions were, we refer the Court to the opinion of the Court of Appeals and to our briefs filed in that Court.

COURT OF APPEALS DECIDED QUESTION OF LAW.

In holding that the supposed contract was unenforceable for lack of mutuality (R. 228-229) the Court of Appeals followed Tennessee law and cited Tennessee authorities as well as one of its own prior decisions in a case also arising in Tennessee. The district judge did not, in his opinion, mention this controlling legal principle—presumably because in deciding the case on a different theory from that advanced by the plaintiff, and on a cause of action not alleged in the complaint, he had not been given the opportunity to consider the legal defects and weaknesses in such theory.

Since the Court of Appeals decided the case on this question of law, which would have been determinative even if the Court of Appeals had taken the same view of the evidence as the district court, it is clear that the question presented by the petition for certiorari is not presented by the record.

FINDINGS NOT DEPENDENT ON CREDIBILITY OF WITNESSES.

With respect to credibility of witnesses, the district judge said (R. 187): "It is just one of those cases where it seems to me that one side has stretched the truth just a little and the other side hasn't told quite all the truth." It is clear that the judge referred to the petitioner, Stoves, Inc., as having stretched the truth and to respondent, Temco, as not having told all the truth.

Stretching the truth is affirmative misrepresentation. Not telling all the truth may or may not be concealment, depending upon the circumstances. In the case at bar there was no concealment by Temco because the matter referred to by the district judge was a collateral matter which had nothing to do with the issue being tried, viz., "feeling between Mr. Evans and Mr. Hunt" (R. 191), which the district judge thought had been engendered by a disagreement between them, concerning which the district judge questioned one of the witnesses after recalling him to the stand at the conclusion of the trial (R. 186). Trials would be interminable if it were necessary or even permissible for a litigant to introduce all the available evidence in regard to every collateral matter which may be touched upon.

The district judge expressly disclaimed the petitioner's theory that his findings depended upon credibility of witnesses. He followed the remark heretofore quoted with: "I am not making any kind of insinuation that there has been any deliberate falsifying in the case, because I don't think there has. Both sides honestly have their own views about the matter. These views have been influenced by certain other factors that have arisen in the case which have a bearing on it" (R. 187).

What the district judge did was to analyze the evidence and draw therefrom the inference that Temco had made a contract with Stoves, Inc., whereby the latter would be its exclusive distributor in Florida for the entire calendar year 1948 (R. 189-191). The Court of Appeals was of the opinion, on its analysis of this evidence, that the inference drawn by the district judge was not justified, and that there was no such contract, express or implied (R. 221-227). The Court of Appeals was of the opinion that, under Tennessee law, the "usage and custom" found by the district judge to have existed as to the length of distributorship contracts (R. 191), did not justify the district judge's conclusion that Stoves, Inc.'s distributorship arrangement was a contract for the entire calendar year 1948 rather than a mere arrangement at will (R. 228).

A trial judge may have an advantage over an appellate court in determining whether witnesses have "deliberately falsified" if he hears their testimony and observes their demeanor on the witness stand. But when it comes to analyzing evidence and drawing inferences therefrom, the trial judge may be at a disadvantage because of the pressure he is under to reach a conclusion. In the case at bar, the district court adjourned court after the conclusion of the evidence until the following morning, at which time he announced his decision and stated that the case had been "one of the most difficult cases for me to decide," and that "about 1:30 this morning I reached what I thought was the proper decision in the case" (R. 187). The Court of Appeals, on the other hand, had before it the entire written record and ample time for consideration.

UNIFORMITY OF DECISION ON QUESTION PRESENTED IS ALREADY PROVIDED FOR BY RULE 52 (a).

Petitioner argues that this Court should allow the writ of certiorari in this case in order to secure a uniformity of decision among the circuits, on the question whether or not the decision of a district court on the credibility of witnesses is **final.** If this question were presented by the record—and it is not, as heretofore demonstrated—the Federal Rules of Civil Procedure have already done all that a review of this case could do to secure uniformity of decision among the circuits. Rule 52 (a) specifically provides that "**due regard** shall be given to the opportunity of the trial court to judge of the credibility of witnesses." (Emphasis ours.)

In conclusion, it is respectfully submitted that the petition for certiorari is without merit and should be denied.

Respectfully submitted,

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